

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

DOUGLAS BRIAN CROSS

Appellant

v.

L.S.M.C., INC., ET AL.

Respondents

DOCKET NUMBER WD76849

DATE: June 2, 2015

Appeal From:

Circuit Court of Clay County, MO
The Honorable Larry D. Harman, Judge

Appellate Judges:

Division One
James Edward Welsh, P.J., Thomas H. Newton, and Karen King Mitchell, JJ.

Attorneys:

Thomas Mendel, Liberty, MO

Counsel for Appellant

Attorneys:

Michael Shipley, Liberty, MO

Counsel for Respondents

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

DOUGLAS BRIAN CROSS, Appellant, v.
L.S.M.C., INC., ET AL., Respondents

WD76849

Clay County

Before Division One Judges: Welsh, P.J., Newton, and Mitchell, JJ.

Cross filed a multi-count complaint including statutory and common-law claims against individuals and companies involved in refinancing his mortgage. Following a bench trial, the initial judge entered a judgment (April judgment) in Cross's favor on Count 2, which alleged that mortgage broker Turner and his company L.S.M.C., Inc. violated the Missouri Merchandising Practices Act. The court awarded Cross actual and punitive damages. The judgment did not expressly address any of the other counts, but it allowed Cross to recover fair and reasonable attorney's fees "as later determined by the Court."

A successor judge, assigned to the case after the initial judge was appointed to the appeals court bench, conducted a hearing as to attorney's fees in response to Cross's timely filed motion to amend the April judgment. The successor judge amended the judgment by awarding attorney's fees and disposing of the other counts, which the parties had deemed abandoned, in favor of the broker and L.S.M.C. (August judgment).

Thereafter, another judge heard Cross's motion to amend the successor judge's August judgment to remove the "inconsistent" disposition of the abandoned counts and the motion filed by the broker and L.S.M.C. to vacate the amended judgment and grant a new trial. This judge vacated the August judgment and granted a new trial as to all issues (September judgment), including the abandoned counts, finding that the initial judge had issued a partial judgment and the successor judge did not receive evidence on, but decided, counts that had not been addressed in the April judgment. Cross appeals.

REVERSED.

Division One holds:

In his first point, Cross argues court error in granting a new trial as to all issues, including the counts that the parties had agreed were abandoned. We agree.

Rule 79.01 allows a successor judge—one who presides after an action is tried because the initial judge is unable to perform post-trial duties "by reason of going out of office, death, sickness, or other disability"—to grant a new trial if the successor judge believes that she cannot perform those duties because she "did not preside at trial or for any other reason." The judge who granted a new trial abused his discretion in deciding that the Rule 79.01 successor judge erred by issuing a final judgment that included a ruling on counts that both parties agreed were abandoned. Rule 79.01 does not give another judge the authority to decide that the successor judge abused her discretion under Rule 79.01 when that judge is asked to grant a new trial.

While the successor judge's disposition of the abandoned counts may have been in error, the error did not prejudice Cross, because no change was made to the initial outcome in his favor other than to add attorney's fees. Point one is denied.

Cross's second point asks us to correct the successor judge's August judgment to state that Counts 1, 3, 4, 5, 6, 7, and 14 were not submitted and were abandoned. Because Cross failed to seek this relief in his motion to amend the August judgment, and because the disposition of those counts was harmless, we do not decide this issue. Point two is denied.

Therefore, we reverse the September judgment vacating the successor judge's August judgment and ordering a new trial.

Opinion by Thomas H. Newton, Judge

Date: June 2, 2015

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